

ComTech

A S S O C I A T E S

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March 12, 1996

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EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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MAR 12 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: CC Docket No. 92-297

In the Matter of Rulemaking to Amend Part 1, 2, 21, and 25 of the
Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band
to Reallocate the 29.5 - 30.0 GHz Frequency Band to Establish Rules and
Policies for Local Multipoint Distribution Service and for Fixed Satellite
Services

Dear Mr. Caton:

ComTech Associates Incorporated ("ComTech") hereby submits an original and five copies of the following ex parte comments on the Third Notice and Proposed Rulemaking in the above-captioned proceeding ("Third Notice"). ComTech, a prospective Local Multipoint Distribution Service ("LMDS") provider based in Irving, Texas, wishes to supplement the record in this proceeding with respect to three issues of critical importance to the future success of the LMDS industry:

1. The need for FCC preemption of state and local zoning ordinances affecting the installation and maintenance of LMDS transmit and receive devices on subscriber premises;
2. The appropriate regulatory treatment of LMDS operators, to the extent that they may be classified as common carriers for the provision of telecommunications services; and
3. The exemption of LMDS systems from regulation as cable systems, and hence from local cable franchising obligations.

While ComTech previously has filed initial and reply comments in this proceeding, the legal and regulatory considerations affecting each of these issues have been altered considerably by enactment of the Telecommunications Act of 1996 ("The Telecom Act").

For the reasons discussed below, ComTech believes that it is imperative that the Commission address these issues in its pending order on the Third Notice.

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1. Preemption of Local Zoning Ordinances that Restricting the Placement and Operation of LMDS Transmit and Receive Devices.

LMDS holds tremendous potential to serve as a principal source of competition not only to current monopoly and dominant video programming distributors, but also to monopoly local exchange carriers. Indeed, ComTech believes that telecommunications services, including local exchange and exchange access services, may emerge as significant, if not the primary, offerings of LMDS operators. Given the strong commitment of Congress and the Commission to fostering competition in both the local exchange and the video programming distribution market, ComTech respectfully urges the Commission to address in the pending LMDS order all potential unwarranted barriers to the successful implementation of LMDS.

One potential barrier, local zoning regulations that restrict the use of LMDS receive and transmit antennas on subscriber premises, has received scant attention in this proceeding. Yet ComTech believes that unless the Commission acts to preempt unwarranted zoning restrictions affecting LMDS devices, its pro-competitive goals in establishing the LMDS service will be thwarted.

Specifically, ComTech is concerned that, absent Commission action in this proceeding, LMDS transmit and receive devices may "slip through the cracks" of the Commission's existing and pending preemption rules, despite the near-identical interests involved. At its February 29, 1996, open meeting, the Commission, acting in IB Docket 95-59, revised its existing rules preempting local regulations restricting the use of satellite receive-only antennas and satellite transmit antennas.¹ The Commission also proposed to use the same preemption standard as a basis for implementing Section 207 of the Telecom Act, which directs the Commission to adopt rules preempting local and state regulations that "impair a viewer's ability to receive video programming services" through direct broadcast satellite (DBS), multichannel multipoint distribution services (MMDS), and "devices designed for over-the-air reception of TV broadcast signals."² The Commission further proposed to extend the preemption to private covenants that impose unreasonable restrictions on the use of antennas.

While the text of the Commission's rulemaking notice on implementing Section 207 has not yet been released, ComTech is concerned that the scope of the proposed preemption may not be sufficiently broad to encompass LMDS transmit and receive devices. ComTech intends to use antennas on subscriber premises both for over-the-air reception of broadcast signals and as transmit devices used to transmit telecommunications signals. ComTech submits that the same public interest considerations that motivated the Commission to preempt zoning regulations affecting satellite antennas and Congress to enact Section 207 apply to LMDS transmit and receive devices. Nonetheless, given the

¹ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, *Action in Docket Case* (News Release issued Feb. 29, 1996).

² *Telecommunications Act of 1996*, Pub. Law 104-104, Section 207.

very tight regulatory implementation schedules imposed by the Telecom Act, ComTech is concerned that the Commission may decide to limit the scope of the Section 207 implementation proceeding to DBS, MMDS, and other TV reception devices.

Accordingly, ComTech believes that the CC Docket 92-297 LMDS proceeding is the appropriate venue in which to adopt a preemption standard for LMDS transmit and receive devices. ComTech urges the Commission to base the preemption standard on the new rules for satellite antennas, in particular the rule under which a local ordinance is presumptively unreasonable if it restricts the installation and maintenance of an antenna of one meter or less in all areas.³ Further, the preemption should apply equally to LMDS transmit and receive antennas and should extend to private covenants. In this regard, ComTech notes that Congress, in section 704 of the Telecom Act, expressed its clear intent to prohibit local governments from blocking the placement of antennas on the basis of the "environmental effects of radio frequency emissions."⁴

The Commission's statutory authority to adopt such a preemption standard is clear, and has been fully enunciated by the Commission in the IB Docket 95-59 proceeding.⁵ Congressional intent with regard to such preemption is also clear in Sections 207, 704, and 253(a) of the Telecom Act.⁶ Having directly solicited comment on preemption issues in the Third Notice,⁷ the Commission has the authority to act on the issue in this proceeding.

2. The Telecom Act Permits the FCC to Forbear from Imposing Common Carrier Obligations on LMDS Providers.

In the Third Notice, the Commission stated that it had "no alternative but to impose all statutory requirements pertaining to common carriers" on LMDS operators, to the extent that they provide telecommunications services on a common carrier basis.⁸ Congress, however, has since given the Commission an alternative.

Under Section 401 of the Telecom Act, a new section (Section 10) is added to the Communications Act of 1934. Subparagraph (a) specifically requires, the FCC, inter alia,

³LMDS antennas on subscriber premises are expected in most or all instances to be less than eighteen inches in size.

⁴*Telecommunications Act of 1996*, Pub. Law 104-104, Section 704.

⁵*See, e.g., Preemption of Local Zoning Regulation of Satellite Earth Stations*, 10 FCC Rcd 6982 (1995).

⁶Section 253(a) states that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." *Telecommunications Act of 1996*, Pub. Law 104-104, Section 253(a).

⁷*Third Notice* at para. 112.

⁸*Third Notice* at para. 109.

to forbear from applying any regulation to a telecommunications service "if the Commission determines that--

"(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

"(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

"(3) forbearance from applying such provision or regulation is consistent with the public interest."⁹

The Commission is also required to look at the competitive effects of forbearance, including whether forbearance promote competition among telecommunications service providers. If the Commission finds that forbearance will promote competition, then such forbearance will be in the public interest.

Clearly the Commission can and should forbear from regulating LMDS common carrier services, including the requirement that LMDS operators file tariffs. First, LMDS will be competing with incumbent telephone and cable services. LMDS providers will be entering the market with zero market share. LMDS will be the second, and in some cases, the third, fourth or fifth service provider. Enforcement of common carrier regulations for LMDS is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable. If such charges, practices, classifications, or regulations are unjust and unreasonable, consumers will not subscribe to the service.

Second, enforcement of such regulations is not necessary to protect consumers. As noted above, LMDS will be a competitive service, not a monopoly service. With consumer choice, regulation of new entrants is not necessary to protect consumers. Subjecting LMDS to such regulations will more likely delay the onset of competition for these services, deferring the consumer benefits of competition.

Finally, forbearance of LMDS regulation is in the public interest. New entrants into a market already face many hurdles in establishing a customer base against an incumbent provider. Forbearance from common carrier regulations will allow LMDS providers to enter the market sooner, and will allow LMDS providers to provide service more efficiently. The end result will be more competition and faster competition. Subsection 10(b) states that a Commission finding that forbearance promotes competition means that such forbearance is in the public interest.

Having met all the statutory requirements of new section 10, the Commission may forbear from common carrier regulation of LMDS.

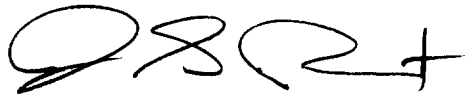
⁹While section 10(c) does allow a telecommunications carrier to petition the Commission for forbearance, there is no prohibition against the Commission forbearing sua sponte.

3. The Telecommunications Act of 1996 Clarifies that an LMDS System is not Cable System.

The Third Notice tentatively concludes that an LMDS system, because it is a wireless service, is not a cable system.¹⁰ Section 301(a)(2) of the Act modifies the definition of cable system to state specifically that "The term 'cable system'... does not include...(B) a facility that serves subscribers without using any public right-of-way." This change in the cable system definition makes it clear that an LMDS system, which does not use any public rights-of-way, is not a cable system and therefore should not subject to cable regulations.

As noted above, the Third Notice also seeks comments regarding preemption issues. Because an LMDS system should not be classified as a cable system, an LMDS system should also not be subject to the franchise requirements of Sections 621 et seq. of the Communications Act of 1934. The Commission should explicitly preempt state and local authorities from imposing franchise obligations on LMDS systems.

Sincerely,



Jason Priest
V.P. of Finance

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¹⁰Third Notice at para. 100.

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